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No. 82-1684

# In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

*v.*

LONE STEER, INC.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA*

## BRIEF FOR THE APPELLANTS

REX E. LEE
*Solicitor General*

KENNETH S. GELLER
*Deputy Solicitor General*

ALAN I. HOROWITZ
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

FRANCIS X. LILLY
*Deputy Solicitor of Labor*

KAREN I. WARD
*Associate Solicitor*

CHARLES I. HADDEN
*Counsel for Appellate Litigation*

STEVEN J. MANDEL
*Attorney*

*Department of Labor*
*Washington, D.C. 20210*

## QUESTION PRESENTED

Whether the subpoena duces tecum issued to appellee pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. 209 and 211, violates the Fourth Amendment because it seeks to compel the production of relevant documentary evidence without a warrant.

## II

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Al Godes and Loren Gilbert, two officers of the Department of Labor, were named as defendants in the district court and are appellants here.

## TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Constitutional and statutory provisions involved ..... 2

Statement ..... 4

Summary of argument ..... 8

Argument

The Fourth Amendment does not prohibit the use of an administrative subpoena duces tecum ..... 10

Conclusion ..... 20


## TABLE OF AUTHORITIES

Cases:


*Blair* v. *United States*, 250 U.S. 273 ..... 12

*CAB* v. *Hermann*, 353 U.S. 322, rev'g 237 F.2d 359 ..... 14

*California Bankers Ass'n* v. *Shultz*, 416 U.S. 21 ..... 14

*Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 ..... 16

*Donovan* v. *Dewey*, 452 U.S. 594 ..... 15

*Donovan* v. *Mehlenbacher*, 652 F.2d 228 ..... 17, 18

*Donovan* v. *Shaw*, 668 F.2d 985 ..... 17

*EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304 ..... 17

*Fisher* v. *United States*, 425 U.S. 391 ..... 14

Page

Cases—Continued:

*Grand Jury Proceedings, In re*, 601 F.2d 162 .... 17

*Inland Steel Co., In re*, 492 F. Supp. 1310 ..... 18

*Kulp Foundry, Inc., In re*, 691 F.2d 1125 ..... 18

*Marshall* v. *Barlow's Inc.*, 436 U.S. 307 ..... 6, 7, 9, 15, 16, 17, 18

*Marshall* v. *Stevens People & Friends for Freedom*, 669 F.2d 171, cert. dismissed, 455 U.S. 930 ..... 17

*Marshall* v. *Walbridge*, 84 Lab. Cas. (CCH) para. 33,723 ..... 17

*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 ..... 8, 11, 12, 13, 15, 16, 17

*See* v. *City of Seattle*, 387 U.S. 541 ..... 9, 14, 16

*Shapiro* v. *United States*, 335 U.S. 1 ..... 10, 18

*United States* v. *Miller*, 425 U.S. 435 ..... 13, 17

*United States* v. *Morton Salt Co.*, 338 U.S. 632 ..... 13

*United States* v. *Powell*, 379 U.S. 48 ..... 13

*Zurcher* v. *Stanford Daily*, 436 U.S. 547 ..... 18

Constitution, statutes and regulations:

U. S. Const. Amend. IV (Warrant Clause) ..... *passim*

Department of Energy Act of 1978, 42 U.S.C. (Supp. V) 7255 ..... 10

Page

Constitution, statutes and regulations—Continued:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1134(c) ..... 10

Fair Labor Standards, Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.* :

Section 9, 29 U.S.C. 209 ..... 2, 4, 7, 8
Section 11, 29 U.S.C. 211 ..... 2, 4, 8
Section 11(a), 29 U.S.C. 211(a) ..... 2
Section 11(c), 29 U.S.C. 211(c) ..... 6, 7

Federal Communications Act, 47 U.S.C. 409(e) ..... 10

Federal Mine Safety and Health Act, 30 U.S.C. 813(d) ..... 10

Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 41 *et seq.* :

Section 9, 15 U.S.C. 49 ..... 3, 4, 8, 10
Section 10, 15 U.S.C. (& Supp. V) 50 ..... 4

Internal Revenue Code, 26 U.S.C. 7602 ..... 10

Interstate Commerce Act, 49 U.S.C. (Supp. V) 10321(c) ..... 10

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 521(b) ..... 10

National Labor Relations Act, 29 U.S.C. (& Supp. V) 161 ..... 10

Occupational Safety and Health Act of 1970, 29 U.S.C. 657:

29 U.S.C. 657(a) ..... 7, 9, 15

29 U.S.C. 657(b) ..... 17

Page

Constitution, statutes and regulations—Continued:

Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. 743 ..... 4, 16

29 C.F.R. :

Section 516.2(a) ..... 6
Section 516.5(c) ..... 6

Miscellaneous:

2 W. LaFave, *Search and Seizure* (1978) ..... 13

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA*

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## BRIEF FOR THE APPELLANTS

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### OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-9a) is not reported. The order of the district court denying the motion to alter or amend the judgment (J.S. App. 14a-17a) is not reported.

### JURISDICTION

The judgment of the district court (J.S. App. 9a-10a) was entered on October 28, 1982. A motion to alter or amend the judgment was denied on November 24, 1982 (J.S. App. 13a-14a). The notices of appeal to this Court were filed on December 15, 1982 (J.S. App. 11a-12a). On February 4, 1983, Justice Blackmun extended the time within which to docket the appeal to and including April 14, 1983. The Jurisdictional Statement was filed on that date, and the Court noted probable jurisdiction on June 6, 1983 (J.A. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(a), provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 9 of the Fair Labor Standards Act of 1938, 29 U.S.C. 209, provides:

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor and the industry committees.

Section 9 of the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 49, provides in pertinent part:

For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience of a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena

issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

## STATEMENT

1. On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the United States Department of Labor, telephoned appellee, a motel-restaurant located in Steele, North Dakota, and informed its manager, Susanne White, that he would commence an investigation of the establishment the following morning. Godes requested White to have available for inspection time, wage and payroll records for all employees for the past two years (J.S. App. 2a; J.A. 12). The investigation was to be conducted pursuant to Section 11 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 211, and its purpose was to determine whether appellee was in compliance with the FLSA.[1] White telephoned Godes later that

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[1]Section 11 of the FLSA authorizes the Secretary of Labor to conduct investigations to determine whether any provision of the Act has been violated. Specifically, he is authorized to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem appropriate." These investigatory powers are augmented by Section 9 of the FLSA, 29 U.S.C. 209, which, by incorporating by reference Sections 9 and 10 of the Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 49 and 50, authorizes the Secretary "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." (The codification of Section 11 refers to the authority of the Wage-Hour Administrator, but under Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. 743, all functions of all other officers of the Department of Labor are transferred to the Secretary of Labor, although the Secretary may delegate those functions to other officers.)

day and informed him that it would not be convenient to conduct the inspection the following morning (J.S. App. 2a; J.A. 12).

The investigation was then rescheduled for January 14, 1982 (J.S. App. 2a; J.A. 12-13). On January 12, 1982, however, appellee's attorney sent a letter to Godes inquiring about the scope of and reason for the investigation and stating that "[u]ntil this matter is resolved, you do not have permission to conduct an investigation" (J.S. App. 3a; J.A. 13). The Department of Labor, represented by Loren Gilbert, Assistant Regional Administrator for the Wage and Hour Division, replied by letter on January 20, 1982, outlining the general scope of an FLSA investigation, but refusing to explain the reasons for the investigation of appellee because the Secretary's investigatory powers under the FLSA do not depend upon the filing of a complaint (J.S. App. 3a-4a; J.A. 14). Gilbert also asked appellee to inform him if it intended to withhold consent for the rescheduled investigation, "so that I can request an administrative subpoena in order to conduct the investigation" (J.S. App. 4a; J.A. 14). Shortly thereafter, appellee's attorney informed Gilbert that appellee would not permit the investigation without a search warrant issued by an independent magistrate (*ibid.*).

Under instructions to attempt the investigation of appellee and, if permission were refused, to serve an administrative subpoena duces tecum, Godes entered the public lobby area of appellee's premises on February 2, 1982. When the manager did not appear, Godes served the subpoena on an employee of appellee (J.S. App. 4a; J.A. 14-15).[2] The subpoena, signed by the Administrator of the Wage-Hour Division, requested that an officer, agent or employee having

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[2]It is uncontested that appellee was properly served with the subpoena (J.S. App. 4a; J.A. 15).

custody and personal knowledge of appellee's records appear at the Wage-Hour office in Bismarck, North Dakota, on February 9, 1982, to testify regarding appellee's wage practices and to produce certain records. The request was specifically limited to records required by law to be kept by employers, namely, payroll data and sales records relevant to whether the company was covered by the FLSA (see J.A. 25-26).[3] Appellee's attorney subsequently informed the Department of Labor that appellee would not comply with the administrative subpoena on the ground that it was invalid under *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (J.S. App. 5a; J.A. 16-17).

2. Appellee challenged the validity of the subpoena by commencing this action against appellants, the Secretary of Labor, Godes, and Gilbert, in the United States District Court for the District of North Dakota. The amended complaint alleged, *inter alia*, that "[u]se of the administrative [s]ubpeona by [appellants] * * * constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution. Also, said administrative subpoena purports to authorize inspection of [appellee's] records without a warrant or its equivalent" (J.A. 21). Appellee sought preliminary and permanent injunctions prohibiting appellants from "entering [its] premises or seizing any of [its] property with an administrative [s]ubpoena, without obtaining a warrant" (J.A. 22). In addition, appellee's complaint sought a declaratory judgment that the FLSA "is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative [s]ubpoena after entry to inspect has been denied" (J.A. 22). On March 3, 1982, the Secretary of

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[3]Regulations implementing 29 U.S.C. 211(c) require employers to maintain the type of information requested. See 29 C.F.R. 516.2(a) (payroll information) and 516.5(c) (sales and purchase records).

Labor petitioned the district court to compel appellee to comply with the administrative subpoena. The district court consolidated appellee's injunctive and declaratory judgment action with the Secretary's enforcement action.

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of appellee in each case, holding that enforcement of the subpoena would violate the Fourth Amendment (J.S. App. 1a-9a). The court first expressly found that "[t]he actions of the Secretary * * * unquestionably comport" with the provisions of the FLSA setting forth his investigative powers (*id.* at 6a). The court noted that Section 11(c) of the FLSA "specifically authorize[s] the Secretary's representatives to inspect, review and transcribe the records described in the administrative subpoena, and require[s] [appellee] to make those records available for such purposes" and that Section 9 of the Act authorizes the use of subpoenas to require the production of records (J.S. App. 6a). Hence, the court stated, the controlling issue was appellee's contention that "this statutory scheme is constitutionally impermissible and that the records described in the administrative subpoena issued in this case need not be produced except in response to a warrant issued by a judicial officer upon a showing of probable cause," a contention based exclusively on *Marshall* v. *Barlow's, Inc., supra* (J.S. App. 6a).

The district court held that this Court's decision in *Barlow's*, which required a warrant based on probable cause prior to non-consensual searches of work areas under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), applied to FLSA investigations (J.S. App. 7a-8a). Indeed, because there is a more compelling basis for proceeding with a warrantless inspection directed at health and safety than one directed at compliance with wage and hour regulations, the court remarked that the reasoning of

*Barlow's* "applies with equal — if not greater — force in the instant situation" (*id.* at 8a). Accordingly, the court concluded that "the Secretary * * * may *not* proceed to enter upon the premises of [appellee] for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant" (*ibid.*; emphasis in original). In effect, the court held unconstitutional Sections 9 and 11 of the FLSA, 29 U.S.C. 209 and 211, which, by reference to 15 U.S.C. 49, give the Secretary administrative subpoena power to inspect relevant documents without resort to a warrant.

Because the language of the district court's order barred the Secretary from "enter[ing] upon [appellee's] premises" to inspect the records and thus did not "address the relief sought by the Secretary" (J.S. App. 15a), the Secretary filed a motion to alter or amend the judgment (*id.* at 15a-17a) by ordering appellee to comply with the subpoena by producing the records at the place named therein, *i.e.*, the Bismarck office of the Wage and Hour Division (see J.A. 25). Such compliance, of course, would not involve an entry onto appellee's premises. The court denied the motion without explanation (J.S. App. 13a-14a).

## SUMMARY OF ARGUMENT

The district court's unexplained ruling that the Secretary of Labor violated the Fourth Amendment by using a subpoena duces tecum to obtain business records, rather than a warrant based on probable cause, disregards the consistent decisions of this Court and misconceives the purpose and scope of the constitutional protection against "unreasonable searches and seizures."

This Court has repeatedly held that administrative agencies may obtain documents relevant to an authorized investigation by resort to a subpoena duces tecum. Indeed, the leading case on this point, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), upheld the validity of the

administrative subpoena provisions of the Fair Labor Standards Act, the very statute struck down by the district court in this case. Because a subpoena involves only a "constructive search," its reasonableness is guaranteed by safeguards different from those of the Warrant Clause. *Id.* at 208-209. Specifically, the constitutional standard is satisfied if the subpoena duces tecum is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967). The subpoena at issue here plainly met these requirements because it sought production of a discrete category of employee payroll and sales records.

The district court's cryptic decision appears to rest on the unstated premise that *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), overruled the long line of cases upholding the validity of administrative subpoenas. There is no basis for this premise. In *Barlow's*, this Court held unconstitutional the Secretary of Labor's authority to conduct warrantless entries under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), to search work areas for safety or health hazards. But a subpoena, unlike the searches involved in *Barlow's*, does not require or authorize an entry onto private premises. Moreover, the concerns identified by the Court in connection with warrantless OSHA inspections — namely, the unbridled discretion given to officers in the field and the failure to advise the owner of the scope of the search (see 436 U.S. at 323) — simply are not present in the subpoena context. A subpoena specifies the particular documents sought, and it can be enforced only pursuant to court proceedings in which the subpoenaed party may raise objections to its reasonableness. Thus, nothing in *Barlow's* suggests that a warrant based on probable cause must always be used instead of a subpoena.

In sum, the well-established standards governing the specificity and relevance of administrative subpoenas duces tecum adequately protect the legitimate privacy interests of the subpoenaed party. This is particularly true where, as here, the subpoenaed documents are business records required to be kept by law. See *Shapiro* v. *United States*, 335 U.S. 1, 32-35 (1948). The district court's ruling, by eliminating subpoenas duces tecum as an investigative tool and requiring warrants based on probable cause, both frustrates legitimate law enforcement efforts and offers less protection of privacy concerns.

## ARGUMENT

### THE FOURTH AMENDMENT DOES NOT PROHIBIT THE USE OF AN ADMINISTRATIVE SUBPOENA DUCES TECUM

In 1914, Congress conferred upon the Federal Trade Commission the power to subpoena from private persons or companies documents relevant to any matter under investigation. See 15 U.S.C. 49. Since that time, Congress has enacted scores of statutes, including the provisions of the Fair Labor Standards Act at issue here, that confer similar powers on other agencies.[4] This Court has consistently held that the Fourth Amendment does not prohibit the use of this indispensable investigative device. In this case, however, the district court, without any analysis, refused to enforce a routine subpoena duces tecum issued by the Secretary of Labor on the ground that the subpoena

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[4]See, *e.g.*, 49 U.S.C. (Supp. V) 10321(c) (Interstate Commerce Act); 47 U.S.C. 409(e) (Federal Communications Act); 42 U.S.C. (Supp. V) 7255 (Department of Energy Act of 1978); 30 U.S.C. 813(d) (Federal Mine Safety and Health Act); 29 U.S.C. 1134(c) (Employee Retirement Income Security Act of 1974); 29 U.S.C. 521(b) (Labor-Management Reporting and Disclosure Act of 1959); 29 U.S.C. (& Supp. V) 161 (National Labor Relations Act); 26 U.S.C. 7602 (Internal Revenue Code).

provisions of the FLSA are unconstitutional. The court held that the Fourth Amendment permits the examination of business records only pursuant to a warrant supported by probable cause. This decision completely misconceives the purpose and scope of the Fourth Amendment and is manifestly erroneous.

A. Few propositions are better settled today than the validity of an agency's power to issue an administrative subpoena duces tecum for relevant documents without the need to resort to a warrant based on probable cause. In fact, the leading case on this point, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), upheld the validity of the very statute held unconstitutional in this case. Thus, the district court's decision here is inexplicable.

In *Oklahoma Press*, this Court unequivocally rejected the contention that the subpoena power conferred by the FLSA is unconstitutional. 327 U.S. at 195-214. The Court held that the statutory authority to examine documents without a warrant based on probable cause does not violate the Fourth Amendment's proscription against "unreasonable searches and seizures." The Court stated that the execution of a subpoena for specific documents is not an "actual search and seizure" (*id.* at 195) and ruled that the requirements of the Warrant Clause of the Fourth Amendment accordingly are inapplicable. The Court observed that in enforcing a subpoena "[n]o officer or other person [seeks] to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections." 327 U.S. at 195. Rather, the Court held, the issuance of a subpoena is a "constructive search" (see generally *id.* at 202-208) that, to the extent the Fourth Amendment applies to it at all, is governed by the constitutional requirement that it not be "unreasonable." *Id.* at 208.

The "reasonableness" of an administrative subpoena, the Court explained, is guaranteed by safeguards different from the warrant based on probable cause required in other contexts to support "actual searches." 327 U.S. at 209. The protections offered by the Fourth Amendment in the subpoena context are avoiding "too much indefiniteness or breadth in the things required to be 'particularly described' " and ensuring that "the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208. Affording the subpoenaed company the right to a judicial determination of the validity of the subpoena before enforcement prevents these kind of abuses. *Id.* at 209, 217.

Thus, the Court explicitly held that the FLSA Administrator's subpoena authority is not " 'limited . . . by forecasts of the probable result of the investigation.' " 327 U.S. at 216, quoting *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Instead, protection analogous to the probable cause standard is provided in the subpoena context by "the court's determination that [1] the investigation is authorized by Congress [and] is for a purpose Congress can order, * * * [2] the documents sought are relevant to the inquiry * * * [and] [3] specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry." *Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. at 209 (footnote omitted). Accordingly, the Court held that, in the case of an FLSA administrative subpoena, "[i]t is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Id.* at 208-209.

*Oklahoma Press* is generally recognized as the principal decision governing the Fourth Amendment limitations on the administrative subpoena power (see, *e.g.*, 2 W. LaFave, *Search and Seizure* § 4.13, at 191-193 (1978)), but the Court has addressed the subpoena power on several subsequent occasions. These cases reaffirm the fundamental principle that probable cause is not a prerequisite to the issuance and enforcement of a subpoena duces tecum. For example, in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), a unanimous Court relied on *Oklahoma Press* in upholding the Federal Trade Commission's power to compel corporations to file reports concerning their compliance with a cease and desist order. The Court emphatically rejected the contention that the reporting requirement was invalid because it was not based on probable cause; to the contrary, the Court stated that regulatory "agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest" even if a request for information or documents is prompted by "nothing more than official curiosity." *Id.* at 652. A regulatory agency is authorized "[to] take steps to inform itself as to whether there is probable violation of the law" (*id.* at 643); like a grand jury, it must have the "power to get evidence * * * merely on suspicion that the law is being violated, or even just because it wants assurance that it is not" (*id.* at 642-643).

More recently, the Court has rejected several attempts to deviate from the *Oklahoma Press* standards and engraft more stringent Fourth Amendment limitations on particular types of subpoenas. In *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976), the Court held that probable cause was not a prerequisite to enforcement of a subpoena issued to a bank for a depositor's account records. In *United States* v. *Powell*, 379 U.S. 48, 57 (1964), the Court cited the general rule of *Oklahoma Press* in holding that the Internal

Revenue Service did not need probable cause to issue a document summons in connection with a fraud investigation. See also *Fisher* v. *United States*, 425 U.S. 391, 401, 406 (1976); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63-67 (1974) (financial institution reporting requirements). Thus, as the Court stated in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted): "[i]t is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

Under this established body of law, there can be no doubt that the subpoena issued in this case should have been enforced. The district court did not suggest that the subpoena was unduly general or burdensome or invalid on relevancy grounds, and it cannot seriously be contended that it was.[5] The document request was limited to (a) three years of payroll records containing routine wage and hour information that was plainly relevant to investigating compliance with FLSA requirements; and (b) sales records relevant to determining whether appellee was covered by the FLSA (see J.A. 25-26).[6] The request thus was specific and sought only relevant documents, and it surely met the recognized constitutional requirements. Compare *CAB* v. *Hermann*, 353 U.S. 322 (1957), rev'g 237 F.2d 359 (9th Cir. 1956) (upholding subpoena against contention that it was excessively broad).

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[5]Appellee asserted in its complaint that the subpoena was "overly broad in scope and unreasonable" (J.A. 21). Apparently this was not a serious contention, however, because appellee's brief in support of its motions for summary judgment and to dismiss did not elaborate on any objections to the particular subpoena issued here, but rather only contested the validity of using a subpoena at all.

[6]Appellee subsequently acknowledged in its complaint that it was subject to the Act (J.A. 20).

B. The district court made no attempt to harmonize its decision with this established line of authority. Indeed, the court did not even acknowledge the existence of *Oklahoma Press* or the other subpoena cases decided by this Court. Instead, the district court relied exclusively on *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). Thus, the decision below appears to rest on the premise that *Barlow's* overruled sub silentio *Oklahoma Press* and the other cases upholding the constitutionality of administrative subpoenas. That unstated premise is patently wrong.

*Barlow's* concerned the inspection provisions of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. 657(a), which authorized the Secretary of Labor to conduct a warrantless search of the work area of any employment facility in interstate commerce for safety hazards and violations of OSHA regulations. *Barlow's* thus involved a broad administrative power to enter and inspect private premises, and the consequent invasion of privacy, that was unrestrained by any prior judicial review. The Court characterized the OSH Act as "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. Moreover, the Court noted, the statute did not require the inspector to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Ibid.*; footnote omitted. A warrant requirement, the Court concluded, would obviate both of those problems by delimiting the scope of the search and "provid[ing] assurances from a neutral officer" that the proposed search was reasonable and authorized by statute. *Ibid.*; see also *Donovan* v. *Dewey*, 452 U.S. 594, 601 (1981).

These concerns have no application to the "constructive search" involved in the enforcement of an administrative subpoena. The FLSA subpoena does not confer unbridled discretion upon the officer in the field. It is issued by the Wage-Hour Administrator (see *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942)),[7] and it can be enforced only by resort to adversary court proceedings in which the subpoenaed party may raise objections to its reasonableness. See *See* v. *City of Seattle, supra*, 387 U.S. at 544-545; *Oklahoma Press Publishing Co.* v. *Walling, supra*, 327 U.S. at 217. The subpoena is not open-ended like the search in *Barlow's*; it identifies the particular documents to be submitted. See *See* v. *City of Seattle, supra*, 387 U.S. at 544. And most important, the subpoena does not require an entry onto the employer's non-public premises. The subpoenaed company itself, rather than an agency investigator, combs its files to find the documents specified in the subpoena. Nothing is exposed to the agency's view other than the relevant documents. Thus, the subpoena procedure provides in every respect the Fourth Amendment protection that the Court found lacking in *Barlow's* in the absence of a warrant.

In fact, the Court's opinion in *Barlow's* itself undermines the district court's view that, in order to satisfy the Fourth Amendment, a regulatory agency may investigate only by means of a warrant based upon probable cause.[8] The Court

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[7]In *Cudahy*, the Court held that the Administrator could not delegate his statutory authority to issue subpoenas. We note that in Reorg. Plan No. 6 of 1950, Congress transferred this authority to the Secretary of Labor or his delegate. See note 1, *supra*. Pursuant to a delegation by the Secretary, however, the Department has maintained a consistent practice of having the Administrator issue FLSA subpoenas.

[8]Significantly, the Court in *Barlow's* relied heavily (see 436 U.S. at 312-313) on *See* v. *City of Seattle, supra*, which, while establishing an administrative warrant requirement for fire inspections, also confirmed

noted that the injunction affirmed in *Barlow's* "should not be understood to forbid the Secretary from exercising the inspection authority conferred by [the OSH Act] pursuant to regulations and judicial process that satisfy the Fourth Amendment." 436 U.S. at 325 n.23. This statement appears to contemplate the continued validity of subpoenas, which are recognized as a primary means of investigating through the judicial process and are expressly authorized by the OSH Act, 29 U.S.C. 657(b). Thus, *Barlow's* plainly preserves "the traditional distinction between a search warrant and a subpoena" (*United States* v. *Miller, supra*, 425 U.S. at 446), and the lower courts consistently have held that nothing in *Barlow's* undermines the long established validity of administrative subpoenas. See *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 312-313 (7th Cir. 1981); *In re Grand Jury Proceedings*, 601 F.2d 162, 168 & n.1 (5th Cir. 1979); *Marshall* v. *Walbridge*, 84 Lab. Cas. (CCH) para. 33,723 (N.D. Ind. 1978). See also, *e.g.*, *Marshall* v. *Stevens People & Friends for Freedom*, 669 F.2d 171, 176 (4th Cir. 1981), cert. dismissed, 455 U.S. 930 (1982); *Donovan* v. *Shaw*, 668 F.2d 985, 989 (8th Cir. 1982); *Donovan* v. *Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981) (enforcing Department of Labor subpoenas without specific discussion of *Barlow's*).[9]

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the basic principle of *Oklahoma Press* that the Fourth Amendment constraints on an administrative subpoena duces tecum relate to relevance and burdensomeness, not probable cause. See 387 U.S. at 544.

[9]The Court's opinion in *Barlow's* does note that its invalidation of the OSH Act's warrantless inspection provision also applies to an inspection of documents. 436 U.S. at 324 n.22. That comment was made, however, in the context of an entry onto the employer's non-public premises to effect, *inter alia*, a broad inspection of documents in the absence of either a warrant or a subpoena. It certainly does not suggest that a warrant, rather than a subpoena, is necessary for every inspection of documents. Indeed, the Court's primary objection to the document search was the failure to "delineat[e] the scope of [the] search" (*ibid.*), a function that manifestly is performed satisfactorily by a subpoena.

C. Thus, the district court's holding that the Secretary may examine documents relevant to a FLSA investigation only pursuant to a warrant based on probable cause, not a subpoena, is at odds with the consistent decisions of this Court. In addition, the holding makes no sense from the standpoint of the purposes of the Fourth Amendment. The preference for a warrant instead of a subpoena turns accepted Fourth Amendment principles on their head. It is generally recognized that a subpoena duces tecum, which allows the recipient of the subpoena (rather than a law enforcement officer) to search for the relevant documents, is substantially *less* intrusive of privacy interests than a search warrant. See, *e.g., Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563 (1978); *id.* at 571, 573 (Stewart, J., dissenting).[10] Hence, eliminating the availability of an administrative subpoena duces tecum and requiring a regulatory agency to resort to a search warrant does not enhance the protection of privacy.

Finally, this case is a peculiarly inappropriate one in which to characterize a routine administrative subpoena as an undue intrusion into a legitimate privacy interest. All of the records subpoenaed here are ones that are required by law to be maintained. See note 3, *supra*. Thus, the records have a public aspect that vitiates any claim by appellee of a reasonable expectation of privacy in their contents. See, *e.g., Shapiro* v. *United States*, 335 U.S. 1, 32-35 (1948); *Donovan* v. *Mehlenbacher, supra*, 652 F.2d at 231. If the government is empowered to require employers to maintain certain records to help assure compliance with the FLSA,

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[10]Indeed, despite *Barlow's*, some lower courts have held that, because of the safeguards provided by the subpoena process, Congress intended that OSHA inspectors always use a subpoena to inspect documents, and therefore that they may not use a warrant for that purpose. See *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1130-1133 (3d Cir. 1982); *In re Inland Steel Co.*, 492 F. Supp. 1310 (N.D. Ind. 1980).

the government ought to be able to see those records without having to demonstrate probable cause that a statutory violation exists. In sum, the subpoena issued here involved at most a minimal invasion of appellee's privacy, and it was manifestly reasonable within the meaning of the Fourth Amendment.[11] The district court's refusal to enforce the subpoena cannot be countenanced.

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[11]Appellee states that there is a substantial privacy interest involved here because of the government's "repeated attempts to enter the premises." Mot. to Dis. or Aff. 4. This contention is mystifying. It is uncontested that no government official made any attempt to enter appellee's private premises when consent to enter was refused. The only means used to compel production of the documents was the subpoena duces tecum returnable at the Department of Labor's offices. The fact that the district court's opinion and judgment specifically bar the Secretary of Labor from "enter[ing] upon the premises of appellee" (J.S. App. 8a-10a) introduces some confusion on this point. Examination of the facts and pleadings make clear, however, that this phrasing is simply careless drafting and that no issue involving a physical entry onto appellee's premises, either for a general inspection or to inspect subpoenaed documents, is involved in this case.

First, and foremost, the subpoena at issue specifically requested production of the documents at the local Wage-Hour office (see J.A. 15, 25). The relief sought by the government was an order requiring appellee to appear "at such time and place as this Court may order" and produce the documentary evidence "as required by the said *subpoena duces tecum*." Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence 4. Thus, the validity of an entry onto appellee's premises was not even before the district court.

The papers filed by the parties confirm that the issue litigated in the district court was the warrantless "search" involved in the inspection of the documents, rather than an entry that the government did not even seek. The stated basis for the contention in appellee's complaint that the subpoena violated the Fourth Amendment was the allegation that the subpoena "purports to authorize inspection of [appellee's] records without a warrant or its equivalent * * * [and] probable cause" (J.A. 21). The government emphasized in its papers that the subpoena did not require entry onto appellee's premises, stating that compliance officers "are instructed not to enter any non-public area of any establishment without the employer's permission" and that, if an employer does not

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

KENNETH S. GELLER
*Deputy Solicitor General*

ALAN I. HOROWITZ
*Assistant to the Solicitor General*

FRANCIS X. LILLY
*Deputy Solicitor of Labor*

KAREN I. WARD
*Associate Solicitor*

CHARLES I. HADDEN
*Counsel for Appellate Litigation*

STEVEN J. MANDEL
*Attorney*
*Department of Labor*

AUGUST 1983

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want to have its records reviewed on its premises, "compliance officers will agree to any other reasonable arrangements to review the records off the employer's premises." Mem. in Support of Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence 13. Finally, the fact that the subpoena did not contemplate entry onto appellee's premises was again brought to the district court's attention in the government's Motion to Alter or Amend the Judgment (J.S. App. 15a-17a). The court's denial of that motion (*id.* at 13a-14a) plainly demonstrates that its decision holds unconstitutional the use of an administrative subpoena to inspect documents even off the employer's premises.